RENDERED: APRIL 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000291-MR

HARLAN WILLIAMS — APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 16-CI-00178

ASPLUNDH TREE EXPERT COMPANY,
A PENNSYLVANIA CORPORATION; AND
ALAN ADKINS, INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

DIXON, JUDGE: Harlan Williams appeals from the Martin Circuit Court order of summary judgment dismissing his claims against Asplundh Tree Expert Company, a Pennsylvania Corporation, ("Asplundh") and Alan Adkins, individually. After careful review, discerning no error, we affirm.

Williams worked for Asplundh for 33 years, beginning as a tree climber and working his way up to a crew foreman, prior to the termination of his employment. He was familiar with Asplundh's policies and procedures which prohibited sleeping during work hours. On August 4, 2016, Williams, and at least two of the three other members of his crew, fell asleep during their lunch period, which ended at 12:30 p.m., and slept until approximately 12:55 p.m. A two-man safety team observed, photographed, and reported the employees' actions to Williams's immediate supervisor and general foreman, Adkins. Adkins escorted Williams and his crew from the job site to their personal vehicles and released them from work, informing them that disciplinary actions would be taken. Consequently, Williams's employment was terminated. However, the crew members, who were younger—with ages ranging from 23 years old to 52 years old—than Williams—who was 60 years old at the time—were not terminated but, instead, placed on a brief suspension followed by a year-long period of probation.

Williams filed the instant suit on October 5, 2016, alleging claims of unlawful discharge in violation of the Kentucky Civil Rights Act (KCRA),[1] wrongful termination, and extreme and outrageous conduct. After significant written discovery and several depositions, Asplundh and Adkins moved for

[1] Kentucky Revised Statutes (KRS) 344.010, *et seq*.

summary judgment on January 22, 2018. Williams responded, and on February 7, 2018, Williams also moved for summary judgment. The same day, the trial court entered its order granting summary judgment in favor of Asplundh and Adkins. This appeal followed.

As an initial matter, in contravention of CR[2] 76.12(4)(c)(v), Williams does not adequately state how he preserved any of his arguments in the trial court.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

[2] Kentucky Rules of Civil Procedure.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012). Williams failed to explain how, or precisely where, he preserved his arguments.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Williams's brief or dismiss his appeal for his attorneys' failure to comply. *Elwell*, 799 S.W.2d 46. While we have chosen not to impose such a harsh sanction, we strongly suggest counsel familiarize themselves with the rules of appellate practice and caution counsel such latitude may not be extended in the future.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. It is well-established a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co.*, 281 S.W.2d 914, 916 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the

evidence is so unsatisfactory as to require a resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citation omitted). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 481 (Ky. 1991) (internal quotation marks and citations omitted). "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor." *Steelvest*, 807 S.W.2d at 480.

An appellate court's role in reviewing an award of summary judgment is to determine whether the trial court erred in finding that no genuine issue of material fact exists and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue.

Pinkston v. Audubon Area Community Services, Inc., 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000)).

In the instant case, because the trial court granted summary judgment to Asplundh and Adkins, we review the facts in a light most favorable to Williams and resolve all doubts in his favor. Applying the *Steelvest* standard, we agree with the trial court that there was no genuine issue of material fact, and Williams could not, and did not, carry his burden. Therefore, we conclude summary judgment was properly granted to Asplundh and Adkins.

Williams alleges Asplundh's and Adkins' behavior violated the KCRA. KRS 344.040 prohibits discrimination "against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's . . . age forty (40) and over[.]" Kentucky courts have "consistently interpreted the civil rights provisions of KRS Chapter 344 consistent with the applicable federal anti-discrimination laws." *Williams v. Wal-Mart Stores, Inc*., 184 S.W.3d 492, 495 (Ky. 2005). "Age discrimination cases under the federal Age Discrimination in Employment Act ('ADEA'), 29 U.S.C. §§ 621-634, are analyzed under the same framework as employment discrimination cases under Title VII" of the 1964 federal Civil Rights Act.[3] *Id.* The Supreme Court of Kentucky held that

[3] 42 U.S.C. § 2000e-2(a)(1).

KRS 344.040 "should be interpreted consonant with federal interpretation" in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992).

The Supreme Court of Kentucky has identified two paths for a plaintiff to establish an age discrimination case. *Williams*, 184 S.W.3d at 495. The first path is to produce direct evidence of discriminatory animus. The second path is to satisfy the burden-shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The instant case, like many, has failed to produce direct evidence of discriminatory animus and, thus, Williams attempts to use the second path to present his claims.

"Under the *McDonnell Douglas* framework a plaintiff can establish a prima facie case of age discrimination by proving that he or she: (1) was a member of a protected class, (2) was discharged, (3) was qualified for the position from which they were discharged, and (4) was replaced by a person outside the protected class." *Williams*, 184 S.W.3d at 496. In the case at hand, there is no dispute the first three elements were met; however, Asplundh and Adkins dispute the fourth element. They assert that Williams was not replaced as his former position was never filled; therefore, he was not replaced by a significantly younger person and fails to satisfy the fourth element. "A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties." *Id.*

In *Williams v. Wal-Mart Stores, Inc*., 184 S.W.3d 492, Ms. Williams—employed as a cashier prior to her separation—asserted that the documentary evidence produced by Wal-Mart in discovery demonstrated that every person hired after her separation was younger. The evidence showed that Wal-Mart's next 16 hires were all more than eight years younger than Ms. Williams, a substantial amount, and only three were over 40 years old. Here, Mr. Williams also asserts that the documentary evidence produced by Asplundh demonstrated that every person hired after his separation was younger than he. The evidence shows Asplundh's next 95 hires were all substantially younger than Mr. Williams and only 11 were over 40 years old. In *Williams*, the court held that even if Wal-Mart established that the cashier duties of Ms. Williams were temporarily absorbed by other employees, it could not overcome the fact that its next 16 hires were substantially younger. *Id*., 184 S.W.3d at 496-97. "Quite simply, when the evidence at trial is viewed in the light most favorable to Williams, it establishes that she was replaced by at least one of these substantially younger individuals." *Id.* at 497. In the case at bar, *none* of Asplundh's next 95 hires were hired for Williams's former position as a foreman. However, viewing the facts in a light most favorable to Williams, it is conceivable that he was replaced by at least one of these new hires.

Once a *prima facie* case of age discrimination has been made, the burden shifts to the employer to articulate "a legitimate nondiscriminatory reason" for the termination decision. *Williams*, 184 S.W.3d at 497 (citations omitted). The defendant then bears the burden of production, which involves no credibility assessments. *Id*. Asplundh presented evidence that it has a strict policy against employees sleeping while "on the clock." Mr. Williams admits he violated this policy and allowed his subordinates to commit this infraction as well. Asplundh contends that Williams was fired for violating these policies, and in accordance with this policy, which permits termination even for a single violation.

We here note that only *one* nondiscriminatory reason is needed if it was integral to the termination decision. Often employers will have more than one reason and/or justification for their employment decisions. The fact that Asplundh, and even Adkins, provided other peripheral and lesser nondiscriminatory reasons for Williams's separation does not negate the legitimacy of the primary reason for the decision to terminate Williams's employment. The critical component to this analysis is to ensure impermissible discrimination is not a motivating factor in termination.

After an employer has provided a legitimate, nondiscriminatory reason for termination, the *McDonnell Douglas* framework disappears. *Id.* As such, the burden of proof shifts back to the plaintiff to persuade the trier of fact, by

a preponderance of evidence, that the employer unlawfully discriminated against him. To prevail, the plaintiff must demonstrate that the employer's stated reason(s) for termination was mere pretext to mask discriminatory motive. The plaintiff must "produce sufficient evidence from which the jury [could] reasonably reject the employer's explanation." *Manzer v. Diamond Shamrock Chems. Co*., 29 F.3d 1078, 1084 (6th Cir. 1994), *overruled on other grounds by Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). Three methods for establishing pretext are to demonstrate: (1) the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision; and (3) the plaintiff could show that the reasons given were insufficient to motivate the decision. *Id*. at 1084. In this case, Williams makes a weak showing of pretext even considering the evidence in a light most favorable to him.

The United States Supreme Court held in *Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000):

> a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. **Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an**

> **employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.** To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not treat discrimination differently from other ultimate questions of fact.
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id., 530 U.S. at 148-49, 120 S.Ct. at 2109 (emphasis added) (internal quotation marks and citations omitted).

In *Reeves*, the plaintiff established a *prima facie* case and "made a substantial showing" the employer's explanation was false. *Id.* at 142-44, 120 S.Ct. at 2106-07. However, in *Williams*, 184 S.W.3d 492, as well as in the present matter, the plaintiffs, at best, "created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109.

In *Williams*, the Supreme Court of Kentucky observed the appropriate inquiry was not only whether a *prima facie* case has been established but whether there was sufficient evidence to permit a rational trier of fact to conclude that the employer had unlawfully discriminated against the plaintiff because of age. *Id*. at 500. In this case, as in that case, we conclude there was not. In *Williams*, the record contained important pieces of uncontroverted evidence that no discrimination occurred, the "most important" of which was that "the sole decisionmaker responsible for terminating Williams did not know how old she was." *Id*. at 500. Similarly, in this case, Bobby King, Asplundh's regional manager, testified in his affidavit that he made the decision to separate Williams from employment, stating, "[a]t the time the decision to separate Harlan Williams was made, I did not know him personally and did not know his age. Age did not play any role in my decision to separate Mr. Williams." Therefore, for the reasons discussed in *Williams*, we conclude, as the trial court did, that this case is one of those "instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109.

Interestingly, Williams urges us to examine his case under a slightly differently worded version of the burden-shifting test found in *Flock v. Brown-*

Forman Corp., 344 S.W.3d 111 (Ky. App. 2010), hoping it will impact our analysis. That panel of our court paraphrased the *McDonnell Douglas* framework from the *Williams* opinion, stating:

> The plaintiff must first establish a prima facie case of age discrimination by showing that he: (1) was a member of a protected class; (2) was discharged; (3) was qualified for the position from which he was discharged; and (4) received disparate treatment from a similarly situated younger person or was replaced by a significantly younger person.

Flock, 344 S.W.3d at 114. Williams homes in on the phrase of the fourth element "received disparate treatment from a similarly situated younger person" in an attempt to salvage his claim. He contends that the fact he was the only employee whose employment was terminated as a result of the incident when two of his crew members were also asleep meets this requirement. Neither Asplundh nor Adkins denies that Williams was treated more harshly than his crew members; however, it is clear from the record that Williams was not "similarly situated" as his position was that of a foreman in charge of the crew. Thus, Williams's attempt to compare his situation with another younger employee of Asplundh who was caught "nodding off" at work fails because that employee was not similarly situated as he was not in a supervisory position.

Finally, even assuming Williams was able to succeed on his claims under the KCRA, there is no genuine issue of material fact regarding the legitimate

reason for his termination. In cases of "mixed-motive firings," a valid and non-discriminatory reason for termination is an adequate basis for the employment action. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977); *see also McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360-61, 115 S.Ct. 879, 885, 130 L.Ed.2d 852 (1995). Asplundh terminated Williams's employment for policy violations when he was found asleep during work hours. Therefore, even if there was a "mixed-motive" for Williams's termination, he would not prevail.

On careful review, it is clear that there are no genuine issues of material fact, and the trial court properly granted summary judgment. Williams's claims fail because he admits there was a legitimate nondiscriminatory reason for terminating his employment. Asplundh had a legitimate nondiscriminatory reason for firing Williams—violation of its policy against sleeping during work hours.

For the foregoing reasons, the order of the Martin Circuit Court is AFFIRMED.

ALL CONCUR.

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